

In the Matter of
COMPUTER PRODUCTS UNLIMITED, INC.,
Case Nos. 37-10 & 53-10

Final Order of Commissioner Brad Avakian

Issued June 8, 2011

SYNOPSIS

Respondent employed four wage Claimants as commissioned salespersons between October 2008 and January 2009. All four Claimants worked straight time and overtime hours. Respondent paid \$420 to one Claimant, \$100 to a second Claimant, and nothing to the other Claimants. Calculated at the minimum wage, the two Claimants who were paid nothing earned \$850.69 and \$2,877.60, respectively, leaving those amounts in unpaid, due, and owing wages. The Claimant who was paid \$420 earned \$3,388.14, leaving \$2,968.14 in unpaid, due and owing wages. The Claimant who was paid \$100 earned \$1,956.01, leaving \$1,856.01 in unpaid, due, and owing wages. Respondent was ordered to pay Claimants their unpaid, due, and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay Claimants \$1,908, \$1,908, \$1,922.40, and \$1,932, respectively, in penalty wages. Respondent was also ordered to pay \$1,908, \$1,908, \$1,922.40, and \$1,932, respectively, in civil penalties based on Respondent's failure to pay minimum and overtime wages to Claimants. ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 12, 2011, at the Eugene office of the Oregon Bureau of Labor and Industries, located at 1400 Executive Parkway, Suite 1400, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Wage claimants Aaron Becker, Amanda Hatton, and Scott Norris were present throughout the hearing and were not represented by counsel. Claimant Michael VanDyck did not attend the

hearing. Respondent Computer Products Unlimited, Inc. did not appear at hearing and was held in default.

The Agency called the following witnesses: Claimants Becker, Hatton, Norris and Bureau of Labor and Industries (“BOLI”) Wage and Hour Division compliance specialist Bernadette Yap-Sam.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing); and
- b) Agency exhibits A-1 through A-41 (submitted prior to hearing) and A-42 (submitted at hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On December 16, 2008, Claimant VanDyck (“VanDyck”) filed a wage claim with the Agency alleging that Computer Products Unlimited, Inc. (“CPUI” or “Respondent”) had employed him and failed to pay wages earned and due to him. At the same time, VanDyck assigned to the Commissioner of BOLI, in trust for himself, all wages due from Respondent.

2) On January 23, 2009, Hatton filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Hatton assigned to the Commissioner of BOLI, in trust for herself, all wages due from Respondent.

3) On February 17, 2009, Becker filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At

the same time, Becker assigned to the Commissioner of BOLI, in trust for himself, all wages due from Respondent.

4) On February 5, 2009, Norris filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the same time, Claimant Norris assigned to the Commissioner of BOLI, in trust for himself, all wages due from Respondent.

5) On June 10, 2009, the Agency issued Order of Determination No. 08-3791 based on the wage claims filed by Becker, Hatton, and VanDyck, and the Agency's investigation. With respect to each Claimant, the Order alleged the following:

Claimant Becker

- Respondent employed Becker from November 30, 2008, to January 13, 2009, at the wage rates of \$7.95 per hour in 2008 and \$8.40 per hour in 2009;
- Becker worked 164 straight time and 17 overtime hours in 2008 and 52 straight time hours and .5 overtime hours in 2009, earning \$1,947.53;
- Respondent has only paid Becker \$100.00, leaving a balance due and owing of \$1,847.53 in unpaid wages, plus interest thereon at the legal rate per annum from February 1, 2009, until paid.
- Respondent willfully failed to pay these wages and owes Becker \$1932.00 in penalty wages, with interest thereon at the legal rate per annum from March 1, 2009, until paid;
- Respondent paid Becker less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to Becker for \$1,932.00 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from March 1, 2009, until paid.

Claimant Hatton

- Respondent employed Hatton from October 28, 2008, to January 13, 2009, at the wage rates of \$7.95 per hour in 2008 and \$8.40 per hour in 2009;
- Hatton worked 342 straight time and 16 overtime hours in 2008 and 56 straight time hours in 2009, earning \$3,380.18;
- Respondent has only paid Hatton \$420.00, leaving a balance due and owing of \$2,960.18 in unpaid wages, plus interest thereon at the legal rate per annum from February 1, 2009, until paid.
- Respondent willfully failed to pay these wages and owes Hatton \$1,922.40 in penalty wages, with interest thereon at the legal rate per annum from March 1, 2009, until paid;

- Respondent paid Hatton less than the wages to which she was entitled under ORS 653.010 to 653.261 and is liable to Hatton for \$1,922.40 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from March 1, 2009, until paid.

Claimant VanDyck

- Respondent employed VanDyck from October 12, 2008, to October 29, 2008, at the wage rate of \$7.95 per hour;
- Hatton worked 96.5 straight time and 7 overtime hours in 2008, earning \$850.69;
- Respondent has paid VanDyck nothing, leaving a balance due and owing of \$850.69 in unpaid wages, plus interest thereon at the legal rate per annum from December 1, 2008, until paid.
- Respondent willfully failed to pay these wages and owes VanDyck \$1,908.00 in penalty wages, with interest thereon at the legal rate per annum from January 1, 2009, until paid;
- Respondent paid VanDyck less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to VanDyck for \$1,908.00 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from January 1, 2009, until paid.

3) On August 6, 2009, Respondent filed an answer and request for hearing through John Bujak, its authorized representative, in which Respondent denied every factual allegation in the Order of Determination and alleged as an “Affirmative Defense” that Claimants Becker, Hatton, and VanDyck were never employees of Respondent.

5) On November 6, 2009, the Agency issued Order of Determination No. 09-0409 based on the wage claim filed by Norris and the Agency’s investigation. The Order alleged the following:

- Respondent employed Claimant Norris from November 1, 2008, through December 13, 2008, at the wage rate of \$7.95 per hour;
- Norris worked 324.75 hours, 77.25 of which were overtime hours, earning \$2,899.22;
- Respondent has paid Norris nothing, leaving a balance due and owing of \$2,899.22 in unpaid wages, plus interest thereon at the legal rate per annum from January 1, 2009, until paid.
- Respondent willfully failed to pay these wages and owes Norris \$1,908.00 in penalty wages, with interest thereon at the legal rate per annum from February 1, 2009, until paid;
- Respondent paid Norris less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to Norris for \$1,908.00 in civil penalties pursuant

to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from February 1, 2009, until paid.

6) On November 23, 2009, Respondent filed an answer and request for hearing through John Bujak, its authorized representative, in which Respondent denied every factual allegation in the Order of Determination and alleged as an “Affirmative Defense” that Norris was never an employee of Respondent.

7) On July 28, 2010, the Hearings Unit issued two Notices of Hearing, one for each Order of Determination, to Respondent, the Agency, and Claimants setting the time and place of hearing for 9:00 a.m. on October 28, 2010, at BOLI’s Eugene office.

8) On July 29, 2010, the Agency moved to consolidate the cases for hearing on the grounds that all four wage claims involved claimants who worked for the same employer, doing the same work, and all alleged unpaid wages in the same general period of time. Respondent did not object and the ALJ granted the agency’s motion on the grounds that they involved common questions of law and fact.

9) On October 25, 2010, Respondent moved for a postponement based on emergency medical treatment required by Mr. Bujak’s wife that could not be put off. The Agency did not object and the ALJ reset the hearing to begin on May 3, 2011. On November 2, 2010, the ALJ reset the hearing to begin on April 12, 2011.

10) Respondent did not make an appearance at the hearing and did not notify the Agency or the ALJ that it would not appear at the time and place set for hearing. The ALJ waited until 9:30 a.m., then declared Respondent in default and commenced the hearing.

11) On April 21, 2011, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Computer Products Unlimited, Inc. was an Idaho general business corporation and an employer that employed one or more persons, including Claimants VanDyck, Becker, Hatton, and Norris, in Eugene, Oregon.

2) In October, November, and December 2008 and January 2009 Respondent operated a kiosk in the Valley River Center ("VRC") shopping mall in Eugene Oregon. Respondent's primary business was selling Clear Wire internet services. While Claimants were employed by Respondent, a sign on the hunting above Respondent's kiosk identified Respondent's business as "Computer Products Unlimited, Inc."

3) Respondent's kiosk at VRC was managed by Christopher Fish ("Fish") during the Claimants' employment. Fish was supervised by David Hunter ("Hunter"), Respondent's CEO, who worked out of Boise, Idaho. Fish was present at the kiosk during much of Claimants' employment.

4) There was no evidence that Respondent had an established workweek during the wage claim periods.

5) VanDyck was interviewed and hired by Fish on October 12, 2008, the same day that he started work. He was hired to work on a commission basis and was trained by Fish and Hunter. His last work day was October 29, 2008. His job was selling Internet services and educating potential customers about Respondent's products.

6) At the beginning of his employment, VanDyck was asked to and completed and a two-page application for work, along with a resume that listed several cook's jobs as his only prior work experience. The words "COMPUTER PRODUCTS UNLIMITED" and "Authorized Representative of **clear** wireless broadband" were

printed across the top of the application, with the words "Contractor Application" printed directly underneath CPU's logo. VanDyck was also asked to sign a Mutual Non-Disclosure Agreement, a Non-Competition Agreement and a Confidential Disclosure Agreement. The only parties to all three agreements were VanDyck and Respondent, with David Hunter being the signatory for Respondent as its "President and CEO."

7) VanDyck made no financial investment in Respondent's business. Fish set VanDyck's work hours. VanDyck's last day of work for Respondent was October 29, 2008. He worked the following dates and hours during his employment with Respondent:

<u>Week Endingⁱ</u>	<u>Total Hours</u>	<u>STⁱⁱ Hours</u>	<u>OTⁱⁱⁱ Hours</u>
10/18/08	32.5	32.5	0
10/25/08	47	40	7
11/1/08	24	24	0

8) In total, VanDyck worked 96.5 straight time hours and 7 overtime hours for Respondent. Computed at Oregon's 2008 minimum wage of \$7.95 per hour, VanDyck earned \$850.69 (96.5 hours x \$7.95 = \$767.18; 7 hours x \$11.93 = \$83.51; \$767.18 + \$83.51 = \$850.69). VanDyck was paid nothing, leaving **\$850.69** in due and owing wages.

9) Penalty wages are computed as follows for VanDyck, in accordance with ORS 652.150: \$7.95 per hour x 8 hours x 30 days = **\$1,908.00**.

10) ORS 653.055 civil penalties are computed as follows for VanDyck, in accordance with ORS 652.150 and ORS 653.055: \$7.95 per hour x 8 hours x 30 days = **\$1,908.00**.

11) Hatton learned of the job with Respondent from a posting on Craig's List for a sales representative position in a VRC kiosk. She responded to the advertisement and met Fish the next day for an interview. At the end of the interview, Fish told Hatton that he would talk to "his boss" and see if she could start work the next day.

Subsequently, Fish told her she was hired and that she would be paid on a commission basis. Her job duties were to sell internet services and educate potential customers about Respondent's products. She started work on Tuesday, October 28, 2008. Fish was her immediate supervisor and Hunter was Fish's boss.

12) Prior to working for Respondent, Hatton worked as a pool cleaner and she had no prior experience selling Internet services.

13) At the beginning of her employment, Hatton was given the same two-page application for work as VanDyck and she completed and submitted it. She and Hunter also signed a Mutual Non-Disclosure Agreement, a Non-Competition Agreement and a Confidential Disclosure Agreement.

14) Hatton made no financial investment in Respondent's business. She was required to work from Respondent's kiosk and Fish set her work hours. She initially kept her pool cleaning job when she started work for Respondent, but was fired from that job because she spent too much time working for Respondent. Hunter, who visited Respondent's VRC kiosk two or three times a month, instructed her how to sell, what to say to potential customers, how to position herself in the kiosk, and told her she was to have at least three advertising fliers in her hand at all times to hand out to potential customers. She could not hire anyone to help her and was hired for an unspecified period of time. Hatton's last day of work was January 13, 2009. On January 14, 2009, Hunter told her not to come back to work. She worked the following dates and hours during her employment with Respondent:

<u>Week Ending^{iv}</u>	<u>Total Hours</u>	<u>ST Hours</u>	<u>OT Hours</u>
11/3/08	26	26	0
11/10/08	41	40	1
11/17/08	41	40	1
11/24/08	41	40	1
12/1/08	43	40	3
12/8/08	30	30	0
12/15/08	41	40	1

12/22/08	51	40	11
12/29/08	39	39	0
1/5/09	22	22	0
1/12/09	31	31	0
1/19/09	8	8	0

15) In total, Hatton worked 340 straight time hours and 18 overtime hours for Respondent in 2008^v and 56 straight time hours in 2009. Computed at Oregon's 2008 minimum wage of \$7.95 per hour, Hatton earned \$2,917.74 in 2008 (340 hours x \$7.95 = \$2,703.00; 18 hours x \$11.93 = \$214.74; \$2,703.00 + \$214.74= \$2,917.74). Hatton earned an additional \$470.40 in 2009 (56 hours x \$8.40 = \$470.40). In total, she earned \$3,388.14. Fish paid her \$100 and Hunter paid her \$320, leaving **\$2,968.14** in due and owing wages.

16) Penalty wages are computed as follows for Hatton, in accordance with ORS 652.150: 358 hours x \$7.95 = \$2,846.10, 56 hours x \$8.40 = \$470.40; \$2,846.10 + \$470.40 = \$3,316.50; \$3,316.50 ÷ 414 hours = \$8.01; \$8.01 per hour x 8 hours x 30 days = **\$1,922.40**.

17) ORS 653.055 civil penalties are calculated in the same manner as ORS 652.150 penalty wages and equal **\$1,922.40**.

18) Becker learned of a job opening with Respondent from Hatton, who told him that Respondent was hiring. On November 28, 2008, Becker was interviewed , at Respondent's VCR kiosk by Fish, who identified himself as Respondent's manager. At the end of the interview, Fish told Becker that he was hired. Becker filled out the same paperwork as VanDyck and Hatton, and Fish said he would fax the paperwork to his boss in Boise. Becker started work on Sunday, November 30, 2008. His job duties were to sell internet services and educate potential customers about Respondent's products. Fish, his immediate supervisor, told him he would be paid on a commission basis.

19) Prior to working for Respondent, Becker had no prior experience selling internet services.

20) Becker made no financial investment in Respondent's business. When Respondent hired him, he had been unemployed for "3-4 weeks" and he had no other source of income while he worked for Respondent. He was required to work from Respondent's kiosk and Fish set his work hours. Becker was taught Respondent's guidelines and standards and had to follow those guidelines and standards in performing his job duties. He could not hire anyone to help him and was hired for an unspecified period of time. Becker's last day of work was January 11, 2009. On January 14, 2009, Hunter told him not to come back to work. Becker worked the following dates and hours during his employment with Respondent:

<u>Week Ending</u> ^{vi}	<u>Total Hours</u>	<u>ST Hours</u>	<u>OT Hours</u>
12/6/08	36	36	0
12/13/08	44	40	4
12/20/08	53	40	13
12/27/08	33	33	0
1/3/09	41	40	1 ^{vii}
1/10/09	22	22	0
1/17/09	4	4	0

21) In total, Becker worked 164 straight time hours and 17 overtime hours for Respondent in 2008^{viii} and 52 straight time hours and one overtime hour in 2009. Computed at Oregon's 2008 minimum wage of \$7.95 per hour, Becker earned \$1,506.61 in 2008 (164 hours x \$7.95 = \$1,303.80; 17 hours x \$11.93 = \$202.81; \$1,303.80 + \$202.81 = \$1,506.61). Becker earned an additional \$449.40 in 2009 (52 hours x \$8.40 = \$436.80, 1 hour x \$12.60 = \$12.60, \$436.80 + \$12.60 = \$449.40). In total, he earned \$1,956.01. He was paid \$100.00, leaving **\$1,856.01** in due and owing wages.

22) Penalty wages are computed as follows for Becker, in accordance with ORS 652.150: 181 hours x \$7.95 = \$1,438.95, 53 hours x \$8.40 = \$445.20; \$1,438.95

+ \$445.20 = \$1,884.15; \$1,884.15 ÷ 234 hours = \$8.05; \$8.05 per hour x 8 hours x 30 days = **\$1,932.00**.

23) ORS 653.055 civil penalties for Becker are calculated in the same manner as ORS 652.150 penalty wages and equal **\$1,932.00**.

24) Norris learned of a job opening with Respondent from a posting on Craig's List for a sales representative position in a kiosk inside VRC. He responded by email to the advertisement on October 31, 2008, and was telephoned by Fish, who interviewed and hired him that same day. During the interview, Fish identified himself as "the manager here." Fish, his immediate supervisor, told him he would be paid on a commission basis. His first day of work was November 1, 2008, and his job throughout his employment with Respondent was selling internet services and educating potential customers about Respondent's products.

25) A "couple of days" after Norris started work, Fish asked him to complete the same employment application, Mutual Non-Disclosure Agreement, a Non-Competition Agreement and Confidential Disclosure Agreement that VanDyck, Hatton, and Becker completed. As with the others, the only parties to all three agreements were VanDyck and Respondent, with David Hunter being the signatory for Respondent as its "President and CEO."

26) Norris made no financial investment in Respondent's business. Fish set Norris's work hours. Norris was taught Respondent's guidelines and standards and had to follow those guidelines and standards in performing his job duties. While working, Norris was not allowed to leave the kiosk and on one occasion Hunter berated him for 20 minutes for taking a break to go to the bathroom. Norris's last day of work for Respondent was December 13, 2008, when he was fired. He worked the following dates and hours during his employment with Respondent:

<u>Week Ending</u> ^x	<u>Total Hours</u>	<u>ST Hours</u>	<u>OT Hours</u>
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11/7/08	41.09	40	1.09
11/14/08	44.83	40	4.83
11/21/08	46.66	40	6.66
11/28/08	55.42	40	15.42
12/5/08	61.58	40	21.58
12/12/08	64.75	40	24.75
12/19/08	10.42	10.42	0

27) In total, Norris worked 250.42 straight time hours and 74.33 overtime hours for Respondent. Computed at Oregon's 2008 minimum wage of \$7.95 per hour, Norris earned \$2,877.60 (250.42 hours x \$7.95 = \$1,990.84; 74.33 hours x \$11.93 = \$886.76; \$1,990.84 + \$886.76 = \$2,877.60). Norris was paid nothing, leaving **\$2,877.60** in due and owing wages.

28) Penalty wages are computed as follows for Norris, in accordance with ORS 652.150: \$7.95 per hour x 8 hours x 30 days = **\$1,908.00**.

29) ORS 653.055 civil penalties for Norris are calculated in the same manner as ORS 652.150 penalty wages and equal **\$1,908.00**.

30) There is no evidence in the record that Respondent kept track of any of the hours worked by Claimants.

31) On January 14, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

"You are hereby notified that MICHAEL JEFFREY VANDYKE has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum and overtime wages of \$822.82 at the rate of \$7.95 per hour from October 12, 2008 to October 29, 2008.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before April 2, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

32) On March 9, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

"You are hereby notified that AARON WILLIAM BECKER has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum and overtime wages of \$2,078.56 at the rates of \$7.95 per hour and \$8.40 per hour from November 30, 2008 to January 11, 2009.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before March 23, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

33) On March 19, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

"You are hereby notified that AMANDA CLAIRE HATTON has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum and overtime wages of \$3,443.70 at the rates of \$7.95 per hour and \$8.40 per hour from October 28, 2008 to January 13, 2009.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

“If your response to the claim is not received on or before April 2, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees.”

34) On July 14, 2009, the Agency mailed a document entitled “Notice of Wage Claim” to Respondent that stated:

“You are hereby notified that SCOTT A NORRIS has filed a wage claim with the Bureau of Labor and Industries alleging:

“Unpaid statutory minimum and overtime wages of \$1,811.11 at the rate of \$7.95 per hour from November 1, 2008 to December 13, 2008.

”IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

“IF YOU DISPUTE THE CLAIM, complete the enclosed ‘Employer Response’ form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

“If your response to the claim is not received on or before July 28, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees.”

35) As of the date of hearing, Respondent had not paid any additional money to the Claimants.

36) In 2008, Oregon’s minimum wage in 2008 was \$7.95 per hour. In 2009, it was \$8.40 per hour.

37) All the witnesses were credible.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Computer Products Unlimited, Inc. was an Idaho general business corporation and an employer that employed one or more persons, including Claimants VanDyck, Hatton, Becker, and Norris, in Eugene, Oregon.

2) VanDyck was employed by Respondent from October 12 through October 29, 2008, as a salesperson. VanDyck worked 96.5 straight time hours and 7 overtime

hours for Respondent. Computed at Oregon's 2008 minimum wage of \$7.95 per hour, VanDyck earned \$850.69 and was paid nothing, leaving **\$850.69** in due and owing wages.

3) Hatton was employed by Respondent from October 28, 2008, until January 13, 2009, as a salesperson. Hatton worked 340 straight time hours and 18 overtime hours for Respondent in 2008 and 56 straight time hours in 2009. Computed at Oregon's 2008 minimum wage of \$7.95 per hour and Oregon's 2009 minimum wage of \$8.40 per hour, Hatton earned \$2,917.74 in 2008 and \$470.40 in 2009, for total earnings of \$3,388.14. She was only paid \$420, leaving **\$2,968.14** in due and owing wages.

4) Becker was employed by Respondent from November 30, 2008, October 28, 2008, until January 11, 2009, as a salesperson. Becker worked 164 straight time hours and 17 overtime hours for Respondent in 2008 and 52 straight time hours and one overtime hour in 2009. Computed at Oregon's 2008 minimum wage of \$7.95 per hour and \$8.40 per hour in 2009, Becker earned \$1,506.61 in 2008 and \$449.40 in 2009, for total earnings of \$1,956.01. He was paid nothing, leaving **\$1,856.01** in due and owing wages.

5) Norris was employed by Respondent from November 1 through December 13, 2008, as a salesperson. He worked 250.42 straight time hours and 74.33 overtime hours for Respondent. Computed at Oregon's 2008 minimum wage of \$7.95 per hour, Norris earned \$2,877.60 (250.42 hours x \$7.95 = \$1,990.84; 74.33 hours x \$11.93 = \$886.76; \$1,990.84 + \$886.76 = \$2,877.60). He was not paid anything, leaving **\$2,877.60** in due and owing wages.

6) The Agency sent a letter entitled "Notice of Wage Claim" to Respondent after receiving each Claimant's wage claim that informed Respondent that a wage claim

had been filed, the amount of the wage claim, and demanded payment of the unpaid wages. As of the date of hearing, Respondent had not paid any additional money to the Claimants.

7) Penalty wages are computed as follows for VanDyck, in accordance with ORS 652.150: $\$7.95 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \mathbf{\$1,908.00}$. ORS 653.055 civil penalties are computed as follows for VanDyck, in accordance with ORS 652.150 and ORS 653.055: $\$7.95 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \mathbf{\$1,908.00}$.

8) Penalty wages are computed as follows for Hatton, in accordance with ORS 652.150: $358 \text{ hours} \times \$7.95 = \$2,846.10$, $56 \text{ hours} \times \$8.40 = \$470.40$; $\$2,846.10 + \$470.40 = \$3,316.50$; $\$3,316.50 \div 414 \text{ hours} = \8.01 ; $\$8.01 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \mathbf{\$1,922.40}$. ORS 653.055 civil penalties are calculated in the same manner as ORS 652.150 penalty wages and equal **\$1,922.40**.

9) Penalty wages are computed as follows for Becker, in accordance with ORS 652.150: $181 \text{ hours} \times \$7.95 = \$1,438.95$, $53 \text{ hours} \times \$8.40 = \$445.20$; $\$1,438.95 + \$445.20 = \$1,884.15$; $\$1,884.15 \div 234 \text{ hours} = \8.05 ; $\$8.05 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \mathbf{\$1,932.00}$. ORS 653.055 civil penalties for Becker are calculated in the same manner as ORS 652.150 penalty wages and equal **\$1,932.00**.

10) Penalty wages are computed as follows for Norris, in accordance with ORS 652.150: $\$7.95 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \mathbf{\$1,908.00}$. ORS 653.055 civil penalties for Norris are calculated in the same manner as ORS 652.150 penalty wages and equal **\$1,908.00**.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Computer Products Unlimited Inc. was an employer that directly engaged the personal services of Claimants VanDyck, Hatton, Becker, and Norris in Oregon and suffered or permitted Claimants to work and

Claimants were Respondent's employees, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(2) by failing to pay to VanDyck all wages earned and unpaid not later than after five days, excluding Saturdays, Sundays and holidays, after October 29, 2008, VanDyck's last work day. Respondent owes VanDyck **\$850.69** in unpaid, due, and owing wages.

4) Respondent violated ORS 652.140(1) by failing to pay to Hatton all wages earned and unpaid not later than the end of Respondent's work day on January 15, 2009. Respondent owes Hatton **\$2,968.14** in unpaid, due, and owing wages.

5) Respondent violated ORS 652.140(1) by failing to pay to Becker all wages earned and unpaid not later than the end of Respondent's work day on January 15, 2009. Respondent owes Becker **\$1,856.01** in unpaid, due, and owing wages.

6) Respondent violated ORS 652.140(1) by failing to pay to Norris all wages earned and unpaid not later than the end of Respondent's work day on December 14, 2008. Respondent owes Claimant **\$2,877.60** in unpaid, due, and owing wages.

7) Respondent willfully failed to pay Claimants VanDyck, Hatton, Becker, and Norris all wages due and owing for work that Claimants performed for Respondent and owes penalty wages to Claimants in the following amounts -- VanDyck: **\$1,908.00**; Hatton: **\$1,922.40**; Becker: **\$1,932.00**; Norris: **\$1,908.00**. ORS 652.150.

8) Respondent paid VanDyck, Hatton, Becker, and Norris less than the wages to which they were entitled under ORS 653.010 to 653.261 by failing to pay them Oregon's statutory minimum wage and overtime for all hours worked and is liable to pay

civil penalties to Claimants in the following amounts -- VanDyck: **\$1,908.00**; Hatton: **\$1,922.40**; Becker: **\$1,932.00**; Norris: **\$1,908.00**. ORS 653.055(1)(b).

OPINION

CLAIMANTS' WAGE CLAIMS

To establish Claimants' wage claims, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if other than the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006). In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in a respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Sehat Entertainment, Inc.*, 30 BOLI 170, 181 (2009).

CLAIMANTS WERE EMPLOYED BY RESPONDENT

Respondent asserted in its answers and requests for hearing that Claimants "were never employees of CPUI." To be liable as an employer for unpaid hours worked by an individual, the employer must "suffer or permit" that individual to work. ORS 653.010(2). While the plain meaning of "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law test for determining an employment relationship. To "permit" something to happen does not require an affirmative act, but only a decision to allow it to happen. To "suffer" something to happen is even broader and means to tolerate or fail to prevent it from happening. Thus, a business may be liable under the provisions of ORS chapter 653 if it knows or has reason to know a worker was performing work in that business and could have prevented it from occurring or continuing. *In the Matter of Rodrigo Ayala*

Ochoa, revised final order on reconsideration, 25 BOLI 12, 38-39 (2003), affirmed without opinion, Ochoa v. Bureau of Labor and Industries, 196 Or App 639, 103 P3d 1212 (2004). In this case, the Agency presented credible evidence that Respondent operated a kiosk in a shopping mall in Eugene, that Fish was Respondent's manager and hired all four Claimants, that Fish set Claimants' work schedule and unilaterally set their commission rate of pay, that Fish and Hunter trained Claimants and controlled their work and working conditions, that all four Claimants performed regular work for Respondent at the kiosk, and that Respondent fired three of the Claimants.^x Although VanDyck did not appear at hearing to testify, the Agency submitted and authenticated his signed and dated wage claim, his application for employment with Respondent, a typed interview with Yap-Sam in which VanDyck described his employment, and a statement from Fish in which Fish acknowledged retaining VanDyck's services to work at Respondent's VRC kiosk. This evidence proves that Respondent employed Claimants and satisfies the first element of the Agency's prima facie case.

At hearing, the Agency presented considerable evidence to rebut Respondent's claim, made during the investigation, that Claimants were independent contractors. The forum does not address this issue because "independent contractor" is an affirmative defense in wage claim cases^{xi} and Respondent did not plead it as a defense in its answers and requests for hearing.^{xii} Respondent's "affirmative defense" that Claimants "were never employees of CPUI" is merely a denial of the first element of the Agency's prima facie case, and not an affirmative assertion that Claimants were 'independent contractors.'" Respondent's denial is overcome by credible evidence presented by the Agency.

CLAIMANTS WERE ENTITLED TO BE PAID THE MINIMUM WAGE

All four Claimants credibly testified that Fish told them that they would be paid on a commission basis. ORS 653.035(2) governs employee's wages when employees are paid on commission. It provides:

“(2) Employers may include commission payments to employees as part of the applicable minimum wage for any pay period in which the combined wage and commission earnings of the employee will comply with ORS 653.010 to 653.261. In any pay period where the combined wage and commission payments to the employee do not add up to the applicable minimum wage under ORS 653.010 to 653.261, the employer shall pay the minimum rate as prescribed in ORS 653.010 to 653.261.”

Under ORS 653.035(2), all the Claimants were entitled to receive at least the minimum wage, and Respondent, in turn, was entitled to offset the minimum wage by any commissions paid out to the Claimants.

CLAIMANTS PERFORMED WORK FOR WHICH THEY WERE NOT PROPERLY COMPENSATED

Hatton was paid \$420, which was only enough to compensate her for 52.8 hours of work, calculated at \$7.95 per hour. Becker was paid \$100, which was only enough to compensate him for 12.6 hours of work, again calculated at \$7.95 per hour. VanDyck and Norris were paid nothing. The Agency proved by a preponderance of the evidence that Hatton and Becker worked far more than 52.8 and 12.6 hours, and that VanDyck and Norris performed work. This satisfies the third element of the Agency's prima facie case with respect to all four Claimants.

AMOUNT AND EXTENT OF WORK CLAIMANTS PERFORMED FOR RESPONDENT

The final element of the Agency's case requires proof of the amount and extent of work performed by Claimants. When the forum concludes that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and

wages involved. *In the Matter of 82nd Street Mall, Inc.*, 30 BOLI 140, 147-48 (2009). In this case, there is no evidence that Respondent ever maintained any records showing the hours that Claimants worked. When the employer produces no records, the forum may rely on evidence produced by the Agency from which “a just and reasonable inference may be drawn.” *Id.* A claimant’s credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.*

At hearing, Hatton, Becker, and Norris credibly testified as to the dates and hours that they worked, and the forum has credited that testimony in its entirety. VanDyck did not appear at hearing to testify. In support of his case, the Agency submitted and authenticated VanDyck’s signed wage claim form and assignment of wages, which included a calendar on which he handwrote the dates and hours that he worked during his wage claim period. In addition, the Agency offered a copy of VanDyck’s application for employment with Respondent, the typed notes of an interview that Yap-Sam conducted with VanDyck in which he told Yap-Sam that he maintained a record of his hours, and a signed statement from Fish in which Fish stated that VanDyck was one of the “assistants” whom he “contracted/hired” to work at the Respondent’s kiosk at the VRC mall. Finally, Hatton testified that she worked at least one day with VanDyck. Based on this corroborating evidence, the forum accepts VanDyck’s calendar of hours worked as a credible record of the amount and extent of work he performed.

The Agency proved by a preponderance of the evidence that Claimants worked the following hours: VanDyck -- 96.5; Hatton – 414; Becker – 233; and Norris – 324.75, on the dates shown in Findings of Fact ## 7, 14, 20, and 26 – The Merits. Relying on the computations shown in those same Findings, the forum concludes that the following unpaid and due wages are owed to the Claimants: VanDyck -- \$850.69; Hatton -- \$2,968.14; Becker -- \$1,856.01; and Norris -- \$2,877.60.

CLAIMANTS ARE OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency established by a preponderance of the evidence that Claimants were entitled to be paid Oregon's minimum wage and that Respondent's manager Fish set Claimants' work hours and worked at the VRC kiosk some of the time and was thereby aware of the hours that Claimants worked. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997). The fact that Respondent may have kept no record of Claimants' hours worked because Respondent considered that Claimants were contractors does not allow Respondent to evade its responsibility for penalty wages.^{xiii} In conclusion, there is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimants. Respondent acted willfully in failing to pay Claimants their wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

"(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.

"(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the

penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand for Claimants' wages contemplated in ORS 652.150(2) after each Claimant filed his or her wage claim. The Agency's Orders of Determination, issued on June 10 and November 6, 2009, repeated the demands.^{xiv} Respondent failed to pay the full amount of each Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this formula, penalty wages for Claimants are: VanDyck: \$1,908.00; Hatton: \$1,922.40; Becker: \$1,932.00; Norris: \$1,908.00.

ORS 653.055 CIVIL PENALTIES

In its Order of Determination, the Agency alleged that Claimants are each entitled to a civil penalty under ORS 653.055(1)(b) based on Respondent's failure to pay Claimants "the wages to which [each] Claimant was entitled under ORS 653.010 to 653.261." ORS 653.055(1)(b) provides that the forum may award civil penalties to an employee when the employer pays less than the wages to which the employee is entitled under ORS 653.010 to 653.261, computed in the same fashion as ORS 652.150 penalty wages. This includes unpaid minimum or overtime wages. *82nd Street Mall*, 30 BOLI 150; *In the Matter of Sehat Entertainment*, 30 BOLI 170, 183 (2009). "Willfulness" is not an element. *In the Matter of Captain Hooks, LLP*, 27 BOLI 21, 225 (2006).

The Agency established by a preponderance of the evidence that all four Claimants worked both straight time and overtime hours. Respondent's failure to pay any wages whatsoever to VanDyck or Norris leaves no doubt that they were not paid minimum wage or overtime. In 2008 alone, Hatton earned \$2,917.74 for her straight

time hours and \$214.74 for her overtime hours. The \$420 that she was paid, applied to her 2008 straight time hours, only compensates her for a small part of those wages, leaving the rest of her accrued straight time and all of her overtime wages for 2008 unpaid. In 2008 alone, Becker earned \$1,506.61 for his straight time hours and \$202.81 for his overtime hours. Like Hatton, the \$100 that he was paid, applied to his 2008 straight time hours, only compensates him for a small part of those wages, leaving the rest of his accrued straight time and all of his overtime wages for 2008 unpaid. All four Claimants are entitled to ORS 653.055(1)(b) civil penalties based on Respondent's failure to pay them the minimum wage or overtime wages for the hours that they worked.

The forum assesses ORS 653.055(1)(b) civil penalties based on the formula set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days). Using this formula, Respondent is liable to pay the following civil penalties to Claimants: VanDyck: \$1,908.00; Hatton: \$1,922.40; Becker: \$1,932.00; Norris: \$1,908.00.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **COMPUTER PRODUCTS UNLIMITED, INC.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Michael Jeffrey VanDyck in the amount of FOUR THOUSAND SIX HUNDRED SIXTY-SIX DOLLARS AND SIXTY-NINE CENTS (\$4,666.69), less appropriate lawful deductions, representing \$850.69 in gross earned, unpaid, due and payable wages; \$1,908.00 in penalty wages; and \$1,908.00 as a civil penalty; plus interest at the legal rate on the sum of \$850.69 from December 1, 2008, until paid, and interest at the legal rate on the sum of \$3,816.00 from January 1, 2009, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Amanda Claire Hatton in the amount of SIX THOUSAND EIGHT HUNDRED TWELVE AND NINETY-FOUR CENTS (\$6,812.94), less appropriate lawful deductions, representing \$2,968.14 in gross earned, unpaid, due and payable wages; \$1,922.40 in penalty wages; and \$1,922.40 as a civil penalty; plus interest at the legal rate on the sum of \$2,968.14 from February 1, 2009, until paid, and interest at the legal rate on the sum of \$3,844.80 from March 1, 2009, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Aaron William Becker in the amount of FIVE THOUSAND SEVEN HUNDRED TWENTY DOLLARS AND ONE CENT (\$5,820.01), less appropriate lawful deductions, representing \$1,856.01 in gross earned, unpaid, due and payable wages; \$1,932.00 in penalty wages; and \$1,932.00 as a civil penalty; plus interest at the legal rate on the sum of \$1,956.01.00 from February 1, 2009, until paid, and interest at the legal rate on the sum of \$3,864.00 from March 1, 2009, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Scott A. Norris in the amount of SIX THOUSAND SIX HUNDRED NINETY-THREE DOLLARS AND SIXTY CENTS (\$6,693.60), less appropriate lawful deductions, representing \$2,877.60 in gross earned, unpaid, due and payable wages; \$1,908.00 in penalty wages; and \$1,908.00 as a civil penalty; plus interest at the legal rate on the sum of \$2,877.60 from January 1, 2009, until paid, and interest at the legal rate on the sum of \$3,816.00 from February 1, 2009, until paid.

ⁱ Because there was no evidence that Respondent had an established workweek, the forum has computed overtime hours based on a workweek that began on October 12, a Sunday, the first day of the week that VanDyck worked and the first day within the scope of his wage claim. See, e.g., *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 188-89 (2007).

ⁱⁱ ST = straight time hours

ⁱⁱⁱ OT = overtime hours

^{iv} Because there was no evidence that Respondent had an established workweek, the forum has computed overtime hours based on a workweek that began on October 2, a Tuesday, the first day of the week that Hatton worked and the first day within the scope of her wage claim.

^v During the week ending January 5, 2009, Hatton worked 5 hours on December 31, 8 hours on January 3, 3 hours on January 4, and 6 hours on January 5.

^{vi} Because there was no evidence that Respondent had an established workweek, the forum has computed overtime hours based on a workweek that began on November 30, a Sunday, the first day of the week that Becker worked and the first day within the scope of his wage claim.

^{vii} Overtime hour worked on January 3, 2009.

^{viii} During the week ending January 3, 2009, Becker worked 7 hours on December 28, 8 hours on December 30, 8 hours on January 1, 10 hours on January 2, and 8 hours on January 3.

^{ix} Because there was no evidence that Respondent had an established workweek, the forum has computed overtime hours based on a workweek that began on November 1, a Saturday, the first day of the week that Norris worked and the first day within the scope of his wage claim.

^x There was no evidence presented as to why VanDyck left Respondent's employment.

^{xi} See, e.g., *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005) (The defense of independent contractor is an affirmative one that a respondent has the burden of proving).

^{xii} See OAR 839-050-0130 ("failure of a party to raise an affirmative defense in the answer is a waiver of such defense").

^{xiii} See, e.g., *In the Matter of Bukovina Express, Inc.*, 27 BOLI 184, 203 (2006) (a respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed.)

^{xiv} See *MAM* at 190 fn. 7 (2007) (the Agency's Order of Determination constitutes a written notice of nonpayment of wages).